



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: IBIS Corporation

File: B-224542

Date: February 9, 1987

DIGEST

1. Contention that Army evaluated awardee's proposal on basis different from others, based on Army's acceptance of offer which allegedly did not comply with requirements of request for proposals, is without merit. Record shows that equipment in fact complied with requirements as modified by letter from contracting officer sent to competitors during negotiations, which in the circumstances had the same effect as a formal solicitation amendment.
2. Contention that Army changed requirements without advising offerors, premised on Army's acceptance of allegedly non-conforming proposal, is without merit where accepted offer conforms to requirements of request for proposals.
3. Request, after best and final offers, for submission of samples of offered equipment does not constitute improper discussions where evaluation prepared for selection official in advance of submission establishes that agency already considered awardee's proposal to satisfy requirements of RFP. Request did not, therefore, require submission of further best and final offers.
4. Contention that Army failed to conduct meaningful discussions is denied where record of negotiations shows that protester was advised of proposal deficiencies and afforded opportunity to respond.
5. Referral of matter of small business concern's responsibility to Small Business Administration under certificate of competency procedures is not required where firm was not selected for reasons other than nonresponsibility.

DECISION

IBIS Corporation protests the Department of the Army's award of a contract to Syscon Corporation under request for

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proposals (RFP) No. DAHC26-85-R-0002. The Army Information Systems Selection and Acquisition Activity (ISSAA) conducted the procurement. We deny the protest.

The Army issued this RFP to acquire bar code readers/scanners (BCR/S), related equipment, software, software development, and maintenance for use with bar codes (similar to the familiar bar codes on grocery items) to keep track of inventories of ammunition, blood stocks in hospitals, etc., in tactical units. The RFP required that commercial products be adapted to meet the Army's requirements, and precluded products developed specifically to meet those requirements. The RFP also required that offerors submit two examples of their equipment in the offered configuration for testing and mandated that all engineering changes sponsored by the manufacturer prior to contract award be included in products delivered under the contract.

The RFP contemplated that the contractor would provide maintenance for 10 years, and asked for both flat monthly and per-incident maintenance pricing. The RFP provided that the government could select either pricing plan. Costs, including maintenance, were to be evaluated on the basis of the total systems life cycle cost (TSLC), which assesses just contract costs in what is essentially a cost times quantity computation. The RFP also advised that the Defense Material System Life Cycle Cost Method (LCCM), which reflects the costs of ownership, such as power, storage, transportation, etc., would be considered. Cost was the most important evaluation criterion, followed in descending order of importance by technical factors, supportability and project management.

Five offerors submitted proposals by the January 21, 1986, closing date. Best and final offers (BAFOs) were submitted on July 16. Because the results of the technical and cost evaluations indicated that the selection decision had been narrowed to IBIS and Syscon, preaward surveys were conducted on both of these offerors. Syscon's preaward survey was favorable; IBIS's survey recommended "no award."

The final technical scores for IBIS and Syscon were only 0.8 points apart, out of a total of 55 points. The cost evaluation accompanying the report to the selection official showed that Syscon's TSLC costs were substantially lower than those of IBIS under either the monthly or per-incident maintenance plan. IBIS's per-month costs were lower, however, under the LCCM model. To address this apparent inconsistency, the report included a third cost model the Army called the total life cycle cost (TLCC), which included

non-duplicative elements from both the TSLC and LCCM cost models. This analysis showed an advantage in favor of IBIS of about \$8 million using per-month maintenance and an advantage of more than \$200 million in favor of Syscon using per-incident maintenance.

On September 24, 1986, the Army selected Syscon for award of the contract, principally on the basis that Syscon was the lowest cost offeror. In further support of the decision, the selecting official also pointed out that maintenance was important; there was reason to believe that maintenance should be performed on a per-incident basis; and as the Army moved in the direction of per-incident maintenance, the Syscon offer became increasingly more attractive. The selecting official also noted that Syscon's proposal appeared to offer the best prospect of maintaining the state-of-the-art and avoiding obsolescence, and that Syscon already had facilities in the Republic of Korea, which IBIS did not, which provided added assurance that equipment could be fielded in the Republic of Korea without delay. The contract was awarded to Syscon on the basis of monthly maintenance, with per-incident maintenance included as an option.

IBIS challenges this procurement on five bases. IBIS contends that: (1) the Army improperly evaluated Syscon's proposal on a basis different from that applied to other offers; (2) the Army changed its requirements without advising other offerors; (3) the Army conducted improper discussions with Syscon after BAFOs; (4) the Army failed to conduct meaningful discussions with IBIS; and (5) the Army failed to refer to IBIS's negative preaward survey to the Small Business Administration (SBA) for consideration of a certificate of competency (COC). We will address each of these allegations in turn.

IBIS's first two allegations are based on related contentions that Syscon's offered equipment did not meet the mandatory requirement of the RFP that it be fully operational by the date of contract award, and that the equipment provided for testing by Syscon with its initial proposal was different from the equipment Syscon offered with its BAFO and which will be delivered under the contract. IBIS also contends that the RFP required the Army to evaluate and award only one maintenance plan. On the basis of these assertions, IBIS contends that the Army's acceptance of Syscon's offer reflects an unannounced change in requirements and demonstrates that the Army evaluated Syscon's proposal on a basis different from that applied to other offers.

Our assessment of these allegations must necessarily start from a determination of what the RFP required in terms of product availability. In Amendment 1 to the RFP, dated October 28, 1985, product availability was defined as meaning that the product satisfied the terms and conditions of the RFP and could be delivered in accordance with the delivery schedule. In conjunction with a requirement in the RFP that all equipment be "state of the art," this same amendment defined "state of the art" as the most recently designed components which are or will be in production, marketed, available, maintained and supported in accordance with the technical specifications prior to contract award, and eliminated the specific exclusion of developmental or prototype equipment contained in the original RFP.

This issue was further addressed in an Army letter dated March 28, 1986, during negotiations, which communicated a second series of deficiencies to all offerors. In this letter, the contracting officer stated:

"If you offer equipment, e.g., new technology, which cannot be delivered for the FAT [first article test -- 90 days after contract award], that is not acceptable. However, if you offer equipment, including new technology, e.g., equipment which is in some stage of development or modification, and tell us that you will deliver the final production version for the FAT, that is acceptable. Delivery of a beta test version, a pilot run, a prototype, a hand-wired engineering model in lieu of a mass-producible model, etc., for the FAT would not be acceptable.

"The situation outlined above does not mean that the Government will accept your unsupported promise to deliver newly manufactured products. It does not mean that the Government will not view this alternative as a higher risk than the use of proven technology, e.g., in terms of reliability and maintainability."

The closing date for this round of discussions was April 7, 1986.

IBIS contends that the "state of the art" definition added by Amendment 1 to the RFP established a requirement for the equipment offered to be fully operational by the date of contract award and asserts that the Army's letter could not change this contract requirement. The Army, on the other hand, states that the above letter made it clear that

products did not have to be fully operational until FAT, 90 days after contract award.

Even if we agree with IBIS that Amendment 1 to the RFP established contract award as the date by which equipment had to be operational, we find that the contracting officer's letter of March 28 was sufficient to apprise offerors that the Army was changing this requirement. Although this letter was not formally designated an amendment, it was in writing, signed by the contracting officer, and sent to all offerors. These are the essential elements of an amendment under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.606 (1986), whether or not issued as a formal numbered amendment. The information in the letter was therefore binding on all offerors. General Electrodynamics Corp., B-221347.2, B-221347.3, May 13, 1986, 86-1 C.P.D. ¶ 454.

Moreover, under our Bid Protest Regulations, if IBIS objected to this change or to the Army's failure to incorporate it into the RFP by formal amendment, IBIS should have protested prior to the April 7 closing date for that round of discussions. 4 C.F.R. § 21.2(a)(1) (1986); see, e.g., American Indian Business & Technologies Corp., B-224476, July 23, 1986, 86-2 C.P.D. ¶ 101, involving an even more informal oral change to requirements. IBIS did not do so.

IBIS's related assertion that Syscon's initial and final equipment offerings differed is premised on a number of underlying contentions. The record shows that Syscon initially offered a scanner called the "MSI PDT III LS," but that Syscon's contract provides for delivery of a scanner called the "MSI PDT LS." MSI Data Corporation manufactures the scanner offered by Syscon. IBIS points to the difference in nomenclature, to MSI's description of the PDT LS as "revolutionary" in commercial literature, and to several technical differences, such as the use of a different computer "chip" called the HD64180, between the MSI PDT LS and the MSI PDT III product line, to bolster its assertion that sometime between initial offers and BAFOs, Syscon substituted a new piece of equipment for that originally offered. IBIS contends that this new equipment never has been subjected to the mandatory qualification tests specified in the RFP and asserts that the Army could not properly impute the test results of Syscon's original equipment, on which Syscon's entry into the competitive range was based, to the new equipment Syscon offered in its BAFO. On the strength of these assertions, IBIS argues that the Army could not properly select Syscon for award of the contract and contends that the Army should have eliminated Syscon from the competitive range.

The assessment of the relative merits of proposals, particularly with regard to technical consideration, is primarily the responsibility of the contracting agency. We consistently have held that agency officials enjoy a reasonable range of discretion in the evaluation of proposals, and that their judgments as to the quality of proposals will not be disturbed unless they are shown to be unreasonable or in violation of procurement laws or regulations. Becon Construction Co., Inc., B-222649, Aug. 18, 1986, 86-2 C.P.D. ¶ 195. We find the Army's judgment here to be reasonable.

The record shows that the scanner which Syscon provided to the Army with its initial offer was a pre-production prototype, with a substantial number of integrated circuits, or "chips," to perform discrete functions; this model used three circuit boards. Syscon's production model uses large-scale integration to perform the same functions with fewer chips on just two boards.^{1/} Syscon's proposal described the technical route Syscon would follow to get from the prototype to the production model, and included a discussion of future enhancements, such as the substitution of a newer type of laser scanning device used to read bar codes. The Army states it understands that MSI changed the name of the PDT III LS to PDT LS prior to award of the contract for marketing reasons, to avoid confusion about its product line. The Army was of the view that Syscon's proposed product evolution -- involved little risk.

Notwithstanding IBIS's disagreement with the Army's conclusion, we think the Army's assessment was reasonable. Most importantly, the RFP permitted developmental products, as described in the contracting officer's letter of March 28, and the progression from smaller scale integration and a higher board count to larger scale integration and a lower board count is normal and common in the development of electronic products. Consequently, the evolution of Syscon's

^{1/} As an example, the "Z-80 compatible" computer chips used in MSI's PDT III product line do not provide a feature known as direct memory access, or DMA; it requires another chip to provide the DMA function. The HD64180 computer chip Syscon uses in its production version of the PDT LS, which IBIS challenges as a significant change from the PDT III product, is a Z-80 compatible chip with on-board DMA, so that the DMA function can be provided without an added chip. See, e.g., Ciarcia, Steve, "Build the SB180 Single-Board Computer," Byte, September 1985, Vol. 10, No. 9, pp. 87, 90-92, for a discussion of the HD64180.

product was neither unusual nor surprising and was not sufficient, in our view, to consider Syscon's production version to be a totally new product. Moreover, we would expect differences in appearance between pre-production and production models, and we find the Army's explanation of Syscon's change in nomenclature more persuasive than we do IBIS's assertion that it reflects a "bait and switch" by Syscon. In sum, we are persuaded that Syscon's initial and final BCR/S offerings are not different products, but merely the same product in different stages of development. Moreover, since we reach this conclusion, MSI's use of the term "revolutionary" in its commercial literature to distinguish this product from others is not relevant.

We also find IBIS's objection to the Army's evaluation and award of more than one maintenance plan to be without merit. The RFP stated, as we noted above, that costs would be evaluated on a TSLC basis. Syscon's costs under either monthly or per-incident maintenance were substantially lower than IBIS's costs on this basis, and they remain so whether just one plan is evaluated or both. Moreover, as the Army points out, TSLC costs are more certain than LCCM costs because the latter are based more on estimates and business judgment rather than hard cost figures, and are subject to variance. Consequently, we cannot find that the Army was unreasonable in concluding that Syscon was the lowest cost vendor.

IBIS's contention that the Army improperly conducted post-BAFO discussions with Syscon arises from events that occurred in conjunction with ISSAA's report to the selecting official. The contracting officer states that on September 10, ISSAA requested both Syscon and IBIS to provide production versions of their BCR/S "as bid" as part of ISSAA's efforts to verify the production capabilities of the offerors and to show them to the selection official so that he could get the "look and feel" of what he was buying. In explanation of this latter objective, the contracting officer states that neither IBIS's equipment nor Syscon's had been seen in its final production version prior to BAFOs. Syscon's equipment, submitted on September 11, lacked two custom chips, which Syscon delivered and installed on September 17. Both samples were shown to the selecting official. It also appears that during the preaward survey, Syscon stated that it might be able to incorporate a newer type of laser scanner in its equipment as early as the FAT.

IBIS contends that the Army needed this examination of Syscon's equipment to establish the equipment's acceptability and that this submission therefore constituted improper post-BAFO discussions with Syscon. IBIS also characterizes

Syscon's remark about the newer scanner as an offer of new equipment which itself amounted to post-BAFO discussions. The final evaluation report to the selection official, however, establishes that the Army found Syscon's proposal to be acceptable well in advance of this equipment submission, and we find no evidence that this submission affected the Army's assessment that Syscon's proposal satisfied the requirements of the RFP, notwithstanding IBIS's speculative comments to the contrary. Moreover, IBIS was afforded the same opportunity provided to Syscon to submit equipment, and we fail to perceive the prejudice which may have befallen IBIS as a consequence. Also, as the Army points out, Syscon's contract does not include the newer laser scanner and we find no evidence that this apparently offhand remark influenced the evaluation. Consequently, we find IBIS's contention that there were improper post-BAFO discussions to be without merit.

IBIS also contends that the Army failed to advise it of the Army's concerns regarding IBIS's ability to manage this project and asserts that the Army did not allow IBIS to submit a new BAFO in conjunction with the submission of equipment noted above. IBIS argues that the Army therefore failed to conduct meaningful negotiations with IBIS.

We find no merit in these arguments. The records of negotiations show that the Army did advise IBIS of its concerns regarding IBIS's management capabilities, contrary to IBIS's assertions here, and afforded IBIS an opportunity to respond during negotiations. Also, since the post-BAFO activities noted above did not constitute discussions, the Army was not obligated to solicit a new BAFO from IBIS. Consequently, the Army was not obligated to initiate a new round of discussions to point out IBIS's failure to respond adequately during negotiations to the Army's concerns.

Last, the Army states that it did not refer IBIS's determination of nonresponsibility to the SBA for consideration of a COC because IBIS never was determined to be nonresponsible. The preaward survey recommendation of "no award" was based essentially on perceived problems under the RFP evaluation scheme with IBIS's management capability. The Army considered these problems to pose substantial risk to the program and reflected this assessment in the final evaluation report. The selection official does not cite this as a reason for not selecting IBIS. Where, as here, the contracting agency does not find a firm to be nonresponsible, the SBA COC procedures are not applicable and referral is not required. Terry B. Armentrout Engineering & Business Consulting, B-222311, May 23, 1986 86-1 C.P.D. ¶ 485.

IBIS has made other allegations, such as a contention that Syscon's BCR/S will not operate on rechargeable batteries, that we will not specifically address. Our Office has reviewed the extensive record in this case, and we find that these additional charges are either contradicted by the record or of little or no consequence and, therefore, without merit.

The protest is denied.

for Seymour Efron
Harry R. Van Cleve
General Counsel